PACIFIC & ORIENT INSURANCE CO BHD
v. AMELIA AMIRUDDIN

HIGH COURT MALAYA, KUALA LUMPUR
ROZ MAWAR ROZAIN JC
[CIVIL APPEAL NO: WA-11BNCvC-52-09-2022]
7 MARCH 2023

Abstract – *Although the law gives the insurers a statutory remedy for insurance policies that ought to be nullified, the requirements in obtaining such a declaration involving accident claims are strict. An insurer cannot benefit from the declaration if the legal requirements under s. 96(3) of the Road Transport Act 1987 are not fulfilled. The declaratory order would be rendered defective and unenforceable against a judgment for damages for the claimant.*

INSURANCE: *Motor insurance – Insurer's liability – Third party claims – Declaratory orders – Insurer obtained declaratory order declaring insurance null and void – Whether declaration worded to exclude third party claims – Whether declaration fulfilled s. 96(3) of Road Transport Act 1987 – Whether insurer entitled to benefit from declaration – Whether declaration defective and unenforceable against judgment for damages for third party*

INSURANCE: *Third party rights against insurer – Motor insurance – Claim under policy – Declaratory orders – Insurer obtained declaratory order declaring insurance null and void – Whether declaration worded to exclude third party claims – Whether declaration fulfilled s. 96(3) of Road Transport Act 1987 – Whether insurer entitled to benefit from declaration – Whether declaration defective and unenforceable against judgment for damages for third party*

The claim against the appellant at the Magistrate's Court was under s. 96(1) of the Road Transport Act 1987 ('RTA') in Suit WA-A72NCvC-2629-05-2018 ('Suit 2629'). This appeal was against the Magistrate's decision that held the appellant legally responsible to pay the respondent the damages awarded to her against one Kirubahgaran Rajeskaran ('Kirubahgaran') whose motorcycle was insured by the appellant. The insured motorcycle was involved in an accident with the respondent. The action where the order awarding the said damages to the respondent was Civil Suit No. WA-A73KJ-908-05-2016 ('Suit 908'). In Suit 908, the Magistrate found liability *via* a judgment in default and assessed the damages. Upon successfully obtaining the judgment, the respondent then sued the appellant in Suit 2629 to recover the sum. The Magistrate had allowed the respondent's claim in Suit 2629 and ordered the appellant to pay, *inter alia,* damages in the amount of RM88,759. The appellant contended that the Magistrate had erred in granting the said order because (i) before the order in Suit 908 awarding the said damages to

the plaintiff, the appellant had obtained a declaratory order from the High Court that declared the insurance for the motorcycle null and void ('declaration'). In Suit WA-24NCvC-426-03-2016 ('Suit 426'), the High Court declared the insurance policy null and void as Kirubahgaran had breached the policy condition by having not disclosed all facts truly and honestly. He was not the actual owner of the motorcycle. It was purchased under his name for his friend. Therefore, the appellant submitted it could not be legally liable to pay the damages awarded to the respondent in Suit 908; and (ii) the appellant claimed that the required statutory notice under s. 96(2) of the RTA for Suit 908 was not served upon it. The respondent submitted that the statutory notice had been served on the appellant as the initial suit in the Sessions Court A53KJ-496-07-2015 ('Suit 496') was transferred to the Magistrate's Court which became Suit 908. At the opposite, the respondent further submitted that the appellant had failed to serve any notice under s. 96(3) of the RTA of its intention to seek the declaration to invalidate the insurance taken by Kirubahgaran in Suit 426. The respondent also submitted that the declaration was not obtained before the date when the liability occurred, which was on the date of the accident. Thus, the respondent urged this court to rule that the Magistrate's decision ordering the appellant to pay to the respondent the judgment sum, was correct.

Held (dismissing appeal):

(1) Declaratory orders given under s. 96(3) of the RTA are carefully worded to not just pronouncing that the particular insurance is null and void, but that it would be unenforceable against the third party pertaining to the accident case at hand. In regard to the declaration herein, the particular way it was worded, there was no express declaration that the appellant was not liable to any third party. There was no reference to any third party or the respondent at all. (paras 29-31)

(2) The scrutiny of the appeal records resulted in the finding that the mandatory notice under s. 96(3) of the RTA was not served by the appellant on the respondent. The Magistrate was correct when she found that the declaration obtained did not fulfil s. 96(3) of the RTA and thus the declaration could not be relied on by the appellant to escape the payment of damages. Although the law gives the insurers, here the appellant, a statutory remedy for insurance policies that ought to be nullified, the requirements in obtaining such a declaration that involved accident claims are strict. The declaratory order must be obtained before the pronouncement of liability. The date of liability would be the date of the judgment in the accident suit – in this case, 16 October 2017 in Suit 908, not the date of the accident, 30 October 2013. There also must be service of the notice illustrating its intention and the cause papers. As such, this court found no quarrel with the Magistrate's decision that the

appellant could not benefit from the declaration as the proviso of serving notice under s. 96(3) of the RTA was not fulfilled. The appellant was not to have the benefit or the advantage of the shield of the declaration to avoid paying the respondent damages awarded as a result of the liability in Suit 908. (paras 32-35)

(3) The Federal Court decision in *AmGeneral Insurance Bhd v. Sa'Amran Atan & Ors And Other Appeals* is instructive whereby the insurer such as the appellant could not extinguish liability against third parties like the respondent. The appellant here was bound to serve the cause papers of Suit 426 on the respondent which it had failed to do, thus there was non-compliance to the procedural requirements under s. 96(3) of the RTA. (paras 36-39)

Case(s) referred to:

Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd [2015] 9 CLJ 821 CA ***(refd)***

AmGeneral Insurance Bhd v. Sa' Amran Atan & Ors And Other Appeals [2022] 8 CLJ 175 FC ***(refd)***

Malaysia National Insurance Sdn Bhd. v. Lim Tiok [1997] 2 CLJ 351 SC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 101

Road Transport Act 1987, ss. 95(2), (3), 96(1), (2), (3)

For the appellant - Kamalanathan, Vinod Kamalanathan & Anis Amira; M/s Vinod Kamalanathan & Assocs

For the respondent - Mohamed Alif Azfar Mohamed Nasir; M/s G Dorai & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Roz Mawar Rozain JC:

This Appeal

[1] The claim against the appellant at the Magistrate's Court was under s. 96(1) of the Road Transport Act 1987 (RTA) in suit WA-A72NCvC-2629-05-2018 (Suit 2629). This appeal is against the Magistrate's decision on 30 August 2022 that held the appellant was legally responsible to pay the respondent the damages awarded to her against one Kirubahgaran a/l Rajeskaran whose motorcycle with the registration WYR3411 was insured by the appellant. The insured motorcycle was involved in an accident with the respondent. The action where the order awarding the said damages to the respondent was Civil Suit No. WA-A73KJ-908-05/2016 (Suit 908).

[2] In Suit 908, the Magistrate found liability *via* a judgment in default on 16 October 2017 and assessed the damages on 2 November 2017. Upon successfully obtaining the judgment, the respondent then sued the appellant in Suit 2629 to recover the sum. The Magistrate had allowed the respondent's following claim in Suit 2629 and ordered the appellant to pay as per prayers (a), (c) and (d) of the respondent's statement of claim which are:

(i) damages in the amount of RM88,759;

(ii) interests of 5% per annum on the said amount from 30 August 2022 to the date of final settlement; and

(iii) costs of RM6.325.

[3] The appellant was also ordered to pay to the respondent the costs of the Suit 2629 proceedings in the sum of RM1,164.

[4] The appellant contended that the Magistrate had erred in granting the said order premised on the following:

(i) before the order in Suit 908 awarding the said damages to the plaintiff, the appellant had on 19 April 2016, obtained a declaratory order from the High Court that declared the insurance for the motorcycle WYR3411 was null and void (declaration). In Suit WA-24NCvC-426-03/2016 (Suit 426), the High Court declared the insurance policy null and void as Kirubahgaran had breached the policy condition by having not disclosed all facts truly and honestly. He was not the actual owner of the motorcycle. It was purchased under his name for his friend Vijenthiran a/l Nagarajah. Therefore, the appellant submitted it cannot be legally liable to pay the damages awarded to the respondent in Suit 908; and

(ii) the appellant claimed that the required statutory notice under s. 96(2) of the RTA for Suit 908 was not served upon it. The appellant submitted that the statutory notice received in 2015 was for a different earlier suit before the Sessions Court which may have been withdrawn by the respondent. It was upon that said notice served in 2015, that the appellant had hired Progressive Adjustment Sdn Bhd (adjusters) to investigate and consequently obtained the declaration from the High Court. According to the appellant, the respondent had not explained nor clarified about the confusion as to the proceedings.

[5] The respondent submitted that the statutory notice had indeed been served on the appellant as the initial suit in the Sessions Court A53KJ-496-07/2015 (Suit 496) was transferred to the Magistrate's Court which became Suit 908.

[6] At the opposite, the respondent further submitted that the appellant had failed to serve any notice under s. 96(3) of the RTA of its intention to seek the declaration to invalidate the insurance taken by Kirubahgaran in Suit 426. The respondent had also submitted that the declaration was not obtained before the date when the liability incurred, which according to the respondent was on the date of the accident – 30 October 2013. Thus, the respondent urged this court to rule that the Magistrate's decision that ordered the appellant to pay to the respondent the judgment sum, was correct.

This Court's Ruling

[7] This appeal was dismissed on the following grounds:

(i) the declaration was worded as not to exclude the third-party accident victim's claims as the respondent's. It had only declared that the insurance was null and unenforceable. It did not declare that it was unenforceable against any third-party claims, in particular, the respondent's claim in the matter;

(ii) the notice under s. 96(3) of the RTA was not served on the respondent which was mandatory. Otherwise, as in this case, the appellant was not entitled to benefit from such declaration. That benefit included not paying damages/claims to third parties like the respondent; and

(iii) the Federal Court in *AmGeneral Insurance Bhd v. Sa' Amran Atan & Ors And Other Appeals* [2022] 8 CLJ 175; [2022] 5 MLJ 825 held that failure to comply with the mandatory notice requirement under s. 96(3) rendered declaratory orders such as the declaration defective and unenforceable against the judgment for damages for the respondent in Suit 908.

The Background Court Actions

[8] There are several suits that led up to the Magistrate's decision which the appellant is appealing against. This court had to scour through all four volumes of the appeal records and all submissions to set the records chronologically. This court found the following:

Suit 496

[9] The respondent had filed her claim at the Sessions Court in 2015 against Kirubahgaran. The respondent had served the statutory notice to the appellant. It was pursuant to this notification that the appellant had hired the adjusters to investigate into the matter. The appellant had appointed a lawyer to represent Kirubahgaran that would take care of its interest.

[10] Suit 496 was transferred to the Magistrate's Court *via* a court order dated 31 March 2016 and subsumed/became Suit 908. This was informed by the counsel for the respondent during the submissions of this appeal. This

court had also found that this was evidence in Suit 908 through the testimony of the respondent. Her written statement WSP at question 4 (p. 461 appeal records vol. 3 encl. 6) after confirming that her solicitors had served the notice under s. 96(2) of the RTA in July 2015, stated:

> Saya telah memfailkan tuntutan di Mahkamah Sesyen Kuala Lumpur Saman No A53KJ-496-07/2015 terhadap Kirubahgaran a/l Rajasekaran dan Tetuan Kanaga, Sureh & Co telah dilantik oleh Defendan untuk mewakili Kirubahgaran a/I Rajasejaran. Tuntutan saya kemudiannya dipindahkan ke Mahkamah Majistret Kuala Lumpur melalui Perintah Mahkamah bertarikh 31/3/2016 dan didaftarkan sebaagai Saman No. WA-A73KJ-908-05/2016. Pad a 16/10/2017, Mahkamah Majistret Kuala Lumpur telah memasukkan Penghakiman ingkar terhadap Kirubahgaran a/l Rajeskaran dan Penghakiman selepas taksiran telah diberikan pada 2/11/2017.

[11] Her cross-examination at pp. 40 to 60 appeal records jilid 1 encl. 4 had not challenged that fact.

Suit 426

[12] The appellant received reports from the adjusters dated 4 February 2016 and 26 February 2016. The reports (pp. 422 to 448 appeal records vol. 3 encl. 6) revealed that at the time of the accident, the motorcycle had been under the custody of the *de facto* owner Vijenthiran, not the named insured Kirubahgaran until the former claimed to have lost it in 2014 the adjusters found that one Muhammad Firdaus Mustafa and also known as Mohamad Fairuz or Vinod, Vijenthiran's friend, was the person who had driven the motorcycle at the time of the accident.

[13] The appellant found that the adjuster's findings showed that Kirubahgaran was not truthful and did not disclose the material fact that the insurance of the motorcycle though issued under his name, was for Vijenthiran. As such, the appellant filed Suit 426 at the High Court in March 2016 to obtain a declaratory order that the insurance policy issued to Kirubahgaran was void and unenforceable. The High Court granted the said declaration on 19 April 2016.

Suit 908

[14] According to the submissions, back at Suit 908 at the Magistrate's Court, the appellant had amended its defence to deny liability after it obtained the declaration from the High Court. The appellant had applied to amend its defence to deny liability, and though rejected by the Magistrate's Court and the High Court, it was allowed by the Court of Appeal. After amending its defence, the appellant then withdrew its representation in Suit 908.

[15] On 16 October 2017, the Magistrate entered a judgment in default against Kirubahgaran who was the named owner of a motorcycle with a registration plate of WYR3411. On 2 November 2017, premised on the respondent's testimony, the Magistrate ordered the appellant to pay to the respondent RM88,759 with interest together with costs of RM11,629.

[16] The respondent served the sealed order on the appellant on 4 January 2018. The acknowledgement service of the same was dated 8 January 2018. Upon the refusal/failure of any payment by the appellant, the respondent had filed Suit 2629.

Suit 2629

[17] As a result of the appellant's failure to pay the said judgment sum, the respondent had initiated this Suit 2629. Initially, on 30 August 2018 the Magistrate had granted a summary judgment against the appellant. The appellant filed an appeal against this order (WA-11ANCvC-101-09/2018 (Appeal 101)) and the High Court on 4 July 2019 had allowed the appeal and remitted the case to the Magistrate's Court for a full trial.

[18] The respondent had filed her application for leave to appeal against the High Court's decision at the Court of Appeal (Appeal W-08-281-07/2019) which was refused on 9 January 2020.

[19] Back at the Magistrate's Court after a full trial, the Magistrate ruled that the respondent was legally bound to pay the respondent. The Magistrate had decided that the declaration obtained by the appellant did not fulfil s. 96(3) of the RTA and could not be relied upon to not pay the judgment sums. The Magistrate had found that the appellant did not give the respondent notice that it had intended to file an originating summons for a declaration to nullify the insurance. The case of *Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd* [2015] 9 CLJ 821 was relied on. The Magistrate had additionally relied on *Malaysia National Insurance Sdn Bhd. v. Lim Tiok* [1997] 2 CLJ 351.

Hence, this appeal.

The Appellant's Arguments

[20] The appellant complained that the respondent had not explained nor proved the statutory notice under s. 96(2) of the RTA served on it in 2015 was for Suit 908. The appellant contended that the said statutory notice served by the respondent was actually for Suit 496.

[21] The appellant contended that the respondent had not explained whether Suit 496 was withdrawn. The appellant then concluded that the respondent had separately filed Suit 908 of which the appellant claimed the statutory notice under s. 96(2) of the RTA was not served on the appellant. The appellant submitted that the respondent did not lead any evidence to disprove this fact.

[22] The appellant submitted that the Magistrate erred when it did not consider that the judgment in default obtained by the respondent in Suit 908 was only against Kirubahgaran and that the appellant's adjusters did not testify in the proceedings. It was also contended the Magistrate was erroneous in failing to consider the following evidence adduced by the witnesses called by the appellant:

(i) the investigation of the adjusters revealed that Kirubahgaran did not know who the rider was at the time of the accident because the motorcycle that was purchased and insured under his name was actually purchased by his friend, one Vijenthiran a/l Nagarajah. Kirubahgaran's name was stated for the insurance and purchase to help out Vijenthiran who had no stable income nor licence for motorcycle at that material time;

(ii) Kirubahgaran averred before a Commissioner of Oaths that he was not responsible for the motorcycle from July 2013 when it was purchased by Vijenthiran. Even though the insurance was under his name, he had never used it and so was not involved in the accident;

(iii) Vijenthiran confirmed Kirubahgaran's story. Vijenthiran on 30 October 2013 had lent the motorcycle to his friend Muhammad Firdaus which was when the latter was involved in the accident;

(iv) Muhammad Firdaus averred that it was him who was involved in the accident with the respondent. He did not lodge a police report regarding the accident. Vijenthiran had repaired the motorcycle;

(v) according to Vijenthiran, sometime in early 2014 the motorcycle was stolen from the place where he had parked it in the basement of Projek Perumahan Rakyat at Kampung Air Panas, Setapak Kuala Lumpur. He did not lodge a police report of this theft nor did report the same to insurers, the appellant;

(vi) the respondent knew the rider of the motorcycle was one Muhammad Firdaus bin Mustafa of which Kirubahgaran had no knowledge;

(vii) there was no evidence to show that Muhammad Firdaus was the servant or agent or rider for the benefit of the insured Kirubahgaran and thus the appellant could not made to be liable; and

(viii) the appellant thus, had sued Kirubahgaran *vide* WA-24NCvC- 426-03/ 2016 and obtained on 19 April 2016 the declaration that the policy issued on the motorcycle was null and unenforceable and thus terminated the insurance between the appellant and Kirubahgaran for breach of a policy condition.

[23] It was the appellant's further submission that the respondent had failed to prove her case as to the liability of the appellant, contrary to s. 101 Evidence Act 1950.

Assessment Of The Appeal

[24] With regard to the appellant's argument that the statutory notice under s. 96(2) of the RTA was not served for Suit 908, this court found that untenable. Evidence showed that the appellant had indeed received it in 2015. It was that notification that invoked its internal protocols of having employed the adjusters to look into the matter. Evidence unrebutted showed that Suit 496 was transferred from the Sessions Court to the Magistrate's Court in March 2016 and became Suit 908. The appellant thereafter upon procuring the declaration in April 2016, had amended the defence to deny liability. The complaint of purported non-service had only raised unnecessary confusion. In any event, the remedy to that would have been to set aside the judgment in default obtained in Suit 908.

[25] However, the appellant had opted to no longer represent its interest in Suit 908 by discharging its legal representative when it had obtained the declaration. Therefore, this court cannot accept the argument that the respondent had not proven the liability of Kirubahgaran when a judgment, *albeit* a judgment in default was obtained with regard to liability in Suit 908.

[26] The argument that the adjusters and the appellant's representatives were not called to testify was rejected by this court as the appellant had opted to withdraw its legal representation in Suit 908.

[27] There was no challenge as to the validity of that judgment in Suit 908. It remained enforceable even as this appeal was heard by this court.

The Declaration

[28] In this court's assessment as to whether the Magistrate was in error when she ruled that the appellant was legally liable to pay the respondent the said damages in Suit 2629 which is the subject matter of this appeal, this court first looked at the declaration. The appellant's other ground for appeal is that it had obtained the declaration which gave it immunity from paying the respondent damages. The order is reproduced below:

> Adalah Diperintahkan bahawa:
>
> (a) Untuk satu deklarasi bahawa polisi insuran No. 01-70-13-KR7-000240 dan sijil Insuran No. 017013KR7000240 dari tempoh 15.07.2013 hingga 14.07.2014 tengah malam 12.00 pagi yang dikeluarkan kepada 'insured' Kirubahgaran a/l Rajasekaran berkenaan motorsikal No. WYR 3411 diisytiharkan batal dan tidak berkuatkuasa;

(b) Kos ditetapkan sebanyak RM1,500 dan fee alokatur sebanyak RM60.00 iaitu 4% daripada jumlah kos.

[29] The particular way the declaration was worded, there was no express declaration that the appellant was not liable to any third party. This court takes cognisance that the declaratory orders given under s. 96(3) of the RTA are carefully worded to not just pronouncing that the particular insurance is null and void but that it would be unenforceable against the third party pertaining to the accident case at hand.

[30] In fact, this court noted that the usual careful practice by the High Court was to ensure notice under s. 95(3) of the RTA was served before sealing the declaratory orders. The declaratory orders were all carefully worded as not only to pronounce the insurance policy and certificate null and void between the insured and the insurers but as importantly, that it would not be enforceable against any third party in the accident claims.

[31] In this declaration, there was no reference to any third party or the respondent at all. The appellant had commenced this Suit 426 after the findings of the investigation by the adjusters found issues with the insurance policy between the appellant and Kirubahgaran. This was only due to the notice under s. 95(2) of the RTA served by the respondent for the accident on 30 October 2013 that involved motorcycle WYR 3411 owned and insured under the name of Kirubahgaran. Thus, the wordings of the declaration showed this court either of the following:

(i) the declaration was not meant to be enforceable against the respondent; or

(ii) the required notice under s. 95(2) of the RTA was not served which would result in the declaration being defective and unenforceable in particular against the respondent.

Service Of Section 96(3) Of The RTA Notice

[32] The scrutiny of the appeal records resulted in this court's finding that the mandatory notice under s. 96(3) of the RTA was not served by the appellant on the respondent. The respondent had testified that she had not received any notice of the appellant's intention to seek the declaration. This fact was not challenged by the appellant in cross-examination.

[33] So, the Magistrate was correct when she found that the declaration obtained did not fulfil s. 96(3) of the RTA and thus, the declaration could not be relied on by the appellant to escape the payment of damages. The Magistrate relied on the Court of Appeal's decision in *Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd* [2015] 9 CLJ 821 that expounded the purpose of the s. 96(3) mandatory notice – which gave

the High Court the option to refuse the granting of declaratory order if the interveners (referring to the third party victims) can demonstrate prejudice. This meant that the notice to the third-party victims like the respondent would have the option to intervene in Suit 426 should she be notified and made aware of the appellant's intention with the cause papers of Suit 426.

[34] Although the law gives the insurers, here the appellant, a statutory remedy for insurance policies that ought to be nullified, the requirements in obtaining such a declaration that involved accident claims are strict. The declaratory order must be obtained before the pronouncement of liability. As frequently held by our courts, the date of liability would be the date of the judgment in the accident suit – in this case 16 October 2017 in Suit 908, not the date of the accident 30 October 2013. There also must be service of the notice illustrating its intention and the cause papers. The mandatory service is clearly seen in the wording of the law:

> (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable: Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

[35] To that, the Court of Appeal in *Ahmad Nadzrin Abd Halim* (*supra*) held that the insurers like the appellant must serve the notice under s. 96(3) of the RTA. As such, this court found no quarrel with the Magistrate's decision that the appellant could not benefit from the declaration as the proviso of serving notice under s. 96(3) of the RTA was not fulfilled. This court opined that it meant the appellant was not to have the benefit or the advantage of the shield of the declaration to avoid paying the respondent damages awarded as a result of the liability in Suit 908.

The Law On The Liability Of The Insurers

[36] Furthermore, the Federal Court's decision in *AmGeneral Insurance Bhd v. Sa 'Amran Atan & Ors And Other Appeals* is instructive whereby the insurer such as the appellant cannot extinguish liability against third parties like the respondent. In para. 29 the Federal Court held as follows:

> Being the registered owner of the car at the time of the accident, the second respondent was deemed by s. 109(2) of the RTA to be liable for the act of omission of the third respondent (driver of the car) in causing

A the accident. She could only absolve herself of liability if she could satisfy the court that she had taken all reasonable steps and precautions to prevent such act or omission by the driver. There is no such evidence before the court. Therefore the third party risks insurance policy, which was issued to indemnify her in the event of an accident involving the car, was in full force at the time of the accident.

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[37] In that case, the car was sold to another although the insurance was still under the name of the initial owner. Even if there was a case of dishonesty pertaining to the insurance policy, it was decided with no uncertainty that (at para. 12):

C In any case, the doctrine of *uberrimae fidei* is a common law doctrine that is only applicable between the insured and the insurer and does not affect the rights of third parties under the provisions of ss. 94 and 95 of the RTA which protect third parties against risks arising out of the use of motor vehicles.

D **[38]** It was reiterated the legal requirements of s. 96(3) of the RTA at para. 96 and the effects in para. 97:

What s. 96(3) mandates is that where the insurer intends to repudiate liability under the policy, it must comply with the following procedural requirements:

E (a) notice must be given to the plaintiff in the tortious claim action to obtain a declaration;

(b) the notice must state the grounds relied on by the insurer to obtain a declaration;

(c) the notice must be served on the plaintiff in the tortious claim
F within seven days after the commencement of the claim; and

(d) the notice must be served on the parties who have interest in the proceedings.

In the present case, the first appellant knew of the pending Bandar Baru Bangi Magistrates Court proceedings against the rider and registered
G owner of the motorcycle (second appellant), yet it chose not to comply with the statutory requirements laid down by the proviso to s. 96(3). The cause papers which out to have been served on the respondent who was the plaintiff in the Bandar Baru Bangi Magistrates Court proceedings were not served on him.

H This was **an outright contravention of s. 96(3), rendering the declaration order issued by the High Court irregular, defective and unenforceable**. The first appellant had no discretion not to comply with the proviso to s. 96(3). Nor does the court have the discretion to allow any such application which suffers from such **fundamental defect**.

(emphasis added)

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[39] The Federal Court found that the insurer was disentitled to the benefit of the provision if there was non-compliance to the procedural requirements. The appellant here was bound to serve the cause papers of Suit 426 on the respondent which it had failed to do so.

Conclusion

[40] The appeal was dismissed. The Magistrate's judgment was affirmed. The appellant must pay the respondent damages. Costs of this appeal in the sum of RM10,000 was awarded to the respondent.